

**2009 DRAFTING REQUEST****Bill**Received: **11/17/2008**Received By: **gmalaise**Wanted: **As time permits**

Identical to LRB:

For: **Lena Taylor (608) 266-5810**By/Representing: **Eric Peterson**This file may be shown to any legislator: **NO**Drafter: **gmalaise**

May Contact:

Addl. Drafters:

Subject:     **Discrimination**  
              **Employ Priv - minimum wage**  
              **Employ Priv - family leave**

Extra Copies:

Submit via email: **YES**Requester's email:         **Sen.Taylor@legis.wisconsin.gov**

Carbon copy (CC:) to:

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**Pre Topic:**

No specific pre topic given

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**Topic:**

State liability under federal employment laws

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**Instructions:**

See attached--redraft 2007 SB 461

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	gmalaise 11/17/2008	kfollett 11/25/2008		_____			State
/1			phenry 11/26/2008	_____	cduerst 11/26/2008	mbarman 01/21/2009	

FE Sent For: **"/1" @ intro. 1/28/09**

&lt;END&gt;

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/?	gmalaise	11/15 f 11/25	11/26 ph	11/26 ph			
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FE Sent For:

<END>

**Malaise, Gordon**

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**From:** Peterson, Eric  
**Sent:** Saturday, November 15, 2008 4:04 PM  
**To:** Malaise, Gordon  
**Subject:** Drafting for Senator Taylor

Gordon,

Can you please draft the following 07 drafts into 09 format? No changes in language.

Thanks,  
Eric

07 SB 461

***Eric M. Peterson***

Office of Senator Lena C. Taylor  
608-266-5810

2007 - 2008 LEGISLATURE

LRB-402271

GMM:wj:rs

2007 SENATE BILL 461

February 5, 2008 - Introduced by Senators TAYLOR and RISSE, cosponsored by Representatives MASON, HIXSON, BLACK, SHERIDAN, POCAN, BOYLE, SINICKI, TURNER, SCHNEIDER, SOLETSKI, BENEDICT, GRIGSBY, VAN AKKEREN and YOUNG. Referred to Committee on Judiciary, Corrections, and Housing.

AN ACT <sup>or of</sup> to create 103.10 (15), 109.115 and 111.40 of the statutes; <sup>Federal</sup> relating to: <sup>or</sup> <sup>Regen</sup>

1 liability of the state for a violation of the federal Family and Medical Leave Act

2 of 1993, Fair Labor Standards Act, ~~the~~ Age Discrimination in Employment Act

3 of 1967, ~~and~~ Title I of the Americans with Disabilities Act of 1990.

4

**Analysis by the Legislative Reference Bureau**

~~Under current state law, an employer, including the state, that engages in an act of employment discrimination against an individual on the basis of disability or, if the individual is 40 years of age or over, age may be ordered to take such action as will effectuate the purpose of the state Fair Employment Law, including the provision of back pay. In addition, under current state law, an employer, including the state, that fails to pay an employee the applicable minimum wage determined by the Department of Workforce Development by rule or to pay an employee 1.5 times the employee's regular rate of pay for hours worked in excess of 40 hours per week (overtime pay) may be ordered to pay the wages due, plus increased wages equal to 50 percent of the amount of wages due or, in certain cases, increased wages equal to 100 percent of the amount of wages due. Also, under state law, an employer, including the state, that interferes with, restrains, or denies the exercise of any right provided under the state Family and Medical Leave Act may be ordered to take action to remedy the violation, including the provision of back pay, and may be sued in circuit court for damages caused by such a violation.~~

Current federal law similarly prohibits an employer, including a state, from discriminating against an individual on the basis of disability or, if the individual is

**SENATE BILL 461**

40 years of age or over, age; requires an employer, including a state, to pay the federal minimum wage and overtime pay; and requires an employer, including a state, to provide family and medical leave. Specifically:

1. Under the Americans with Disabilities Act of 1990 (ADA), an employer, including a state, that discriminates against a qualified individual with a disability may be ordered to take appropriate action, including the provision of back pay, and may be ordered to pay compensatory damages for future pecuniary losses and for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses of up to \$300,000, depending on how many employees are employed by the employer.

2. Under the Age Discrimination in Employment Act of 1967 (ADEA), an employer, including a state, that discriminates against an individual 40 years age or over on the basis of age may be ordered to take such action as will effectuate the purposes of the ADEA, including the provision of back pay, and, if the violation is willful, may be ordered to pay an equal amount of liquidated damages.

3. Under the Fair Labor Standards Act (FLSA), an employer, including a state, that fails to pay an employee the minimum wage or overtime pay may be ordered to provide back pay and to pay an equal amount of liquidated damages.

4. Under the federal Family and Medical Leave Act of 1993 (FMLA), an employer, including a state, that interferes with, restrains, or denies the exercise of or the attempt to exercise any right provided under the FMLA may be ordered to provide back pay or pay actual monetary losses, plus interest, and to pay an equal amount of liquidated damages.

The U.S. Supreme Court has recently held, however, that a state employee may not sue for damages for a violation of the ADA (*Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001)), of the ADEA (*Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000)), or of the FLSA (*Alden v. Maine*, 527 U.S. 706 (1999)), unless the state has waived its sovereign immunity under the 11th Amendment to the U. S. Constitution and, in the case of this state, article IV, section 27, of the Wisconsin Constitution. The U.S. Supreme Court has also recently held that a state employee may sue for damages for a violation of the family leave provision of the FMLA, regardless of whether the state has waived its sovereign immunity (*Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003)), but did not rule on whether a state employee may sue for damages for a violation of the medical leave provision of the FMLA absent a waiver of sovereign immunity.

This bill provides that the state may be sued in a federal or state court of competent jurisdiction for a violation of the ADA, the ADEA, the FLSA or the FMLA and, in an action for a violation of any of those acts, is liable for all remedies that are available for such a violation to the same extent that a public entity other than a state is liable.

Insert  
A-1

**SENATE BILL 461**

For further information see the **state** fiscal estimate, which will be printed as an appendix to this bill.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 103.10 (15) of the statutes is created to read:

2           **103.10 (15) STATE LIABILITY UNDER FEDERAL FAMILY AND MEDICAL LEAVE ACT.** The  
3 state may be sued in a federal or state court of competent jurisdiction for a violation  
4 of the federal Family and Medical Leave Act of 1993, 29 USC 2601 to 2654, and, in  
5 an action for a violation of that act, is liable for all remedies that are available for such  
6 a violation to the same extent that a public entity other than a state is liable.

7           **SECTION 2.** 109.115 of the statutes is created to read:

8           **109.115 State liability under Federal Fair Labor Standards Act.** An  
9 employer, as defined in s. 103.01 (1) (b) or 104.01 (3) (b), may be sued in a federal or  
10 state court of competent jurisdiction for a violation of the federal Fair Labor  
11 Standards Act, 29 USC 201 to 219, and, in an action for a violation of that act, is liable  
12 for all remedies that are available for such a violation to the same extent that a public  
13 entity other than a state is liable.

14           **SECTION 3.** 111.40 of the statutes is created to read:

15           **111.40 State liability under federal age and disability discrimination**  
16 **laws.** The state or an agency, as defined in s. 111.32 (6) (a), may be sued in a federal  
17 or state court of competent jurisdiction for a violation of the federal Age  
18 Discrimination in Employment Act of 1967, 29 USC 621 to 634, or Title I of the  
19 federal Americans with Disabilities Act of 1990, 42 USC 12111 to 12117, and, in an  
20 action for a violation of either of those acts, is liable for all remedies that are available  
21 for such a violation to the same extent that a public entity other than a state is liable.

**SENATE BILL 461**

**SECTION 4**

*federal*

**SECTION 4. Initial applicability.**

(1) STATE LIABILITY UNDER FEDERAL EMPLOYMENT LAWS. This act first applies to a violation of the federal Family and Medical Leave Act of 1993, 29 USC 2601 to 2654, Fair Labor Standards Act, 29 USC 201 to 219, or Age Discrimination in Employment Act of 1967, 29 USC 621 to 634, or of Title I of the Americans with Disabilities Act of 1990, 42 USC 12111 to 12117, occurring on the effective date of this subsection.

(END)



**2009-2010 DRAFTING INSERT**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0830/1ins  
GMM.....

(INSERT A-1)

X Under the 11th Amendment to the U. S. Constitution and article IV, section 27, of the Wisconsin Constitution, the state may not be sued for damages unless it has waived its sovereign immunity. Specifically, the U.S. Supreme Court has recently held that, unless a state has waived its sovereign immunity, the state may not be sued for any of the following:

1. Damages for a violation of the Americans with Disabilities Act of 1990 (ADA), which prohibits an employer, including a state, from discriminating against an individual on the basis of disability. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

2. Damages for a violation of the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits an employer, including a state, from discriminating against an individual 40 years of age or over on the basis of age. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

3. Damages for a violation of the Fair Labor Standards Act (FLSA), which requires an employer, including a state, to pay the federal minimum wage and 1.5 times the employee's regular rate of pay for hours worked in excess of 40 hours per week (overtime pay). *Alden v. Maine*, 527 U.S. 706 (1999).

The U.S. Supreme Court has also recently held that a state employee may sue for damages for a violation of the family leave provision of the federal Family and Medical Leave Act of 1993 (FMLA), regardless of whether the state has waived its sovereign immunity (*Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003)), but did not rule on whether a state employee may sue for damages for a violation of the medical leave provision of the FMLA absent a waiver of sovereign immunity.

This bill provides that the state may be sued in a federal or state court of competent jurisdiction for a violation of the ADA, the ADEA, the FLSA or the FMLA and, in an action for a violation of any of those acts, is liable for all remedies that are available for such a violation to the same extent that a public entity other than a state is liable.

Accordingly, under the bill, if an employee of the state sues the state for a violation of the ADA, the ADEA, the FLSA or the FMLA, the state may be ordered as follows:

1. Under the ADA, to take appropriate action, including the provision of back pay, and to pay compensatory damages for future pecuniary losses and for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses of up to \$300,000, depending on how many employees are employed by the employer. The state Fair Employment Law, which similarly prohibits discrimination on the basis of disability, permits an award of back pay, but not of compensatory damages.

2. Under the ADEA, to take such action as will effectuate the purposes of the ADEA, including the provision of back pay, and, if the violation is willful, to pay an equal amount of liquidated damages. The state Fair Employment Law, which

similarly prohibits discrimination on the basis of age, permits an award of back pay, but not of liquidated damages. ✓

X 3. Under the FLSA, to provide back pay and to pay an equal amount of liquidated damages. The state Minimum Wage Law, which similarly requires an employer to pay the state minimum wage and overtime pay, permits an award of the wages due, plus increased wages equal to 50 percent of the amount of wages due or, in certain cases, increased wages equal to 100 percent of the amount of wages due. 1y

4. Under the FMLA, to provide back pay or pay actual monetary losses, plus interest, and to pay an equal amount of liquidated damages. The state Family and Medical Leave Law, which similarly requires an employer to provide family and medical leave, permits an award of back pay and damages, but not of liquidated damages.

(END OF INSERT)

**Barman, Mike**

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**From:** Peterson, Eric  
**Sent:** Wednesday, January 21, 2009 1:15 PM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB 09-0830/1 Topic: State liability under federal employment laws

RUSH

Please Jacket LRB 09-0830/1 for the SENATE.